United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1195 B

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United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1195

DELTA DATA SYSTEMS CORPORATION,

Appellee,

—against—

GRAPHIC SCANNING CORP.,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT

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POINT I

Graphic's examination of witnesses at the trial is no substitute for discovery.

Delta makes the unique argument that Graphic has had discovery by virtue of the fact that it examined certain of Delta's employees at the trial (D. Br., p. 50).* Yet Delta cites not a single authority supporting the proposition that examination at a trial constitutes an acceptable substitute for discovery procedures such as examination *before* trial which are accorded a party as a matter of right by the Federal Rules of Civil Procedure.

Delta admits that there was a stipulation between counsel as to the priority of discovery, *i.e.*, Delta would com-

* "D. Br." in parentheses refers to Delta's Brief herein.

plete its discovery first and then Graphic would be accorded a full opportunity to complete its discovery (D. Br., p. 10). Thus, although Graphic had served a notice to produce documents upon Delta in May, 1973, no document in response was forthcoming until late November, 1973—virtually on the eve of trial and not until after a second notice had been served on November 19, 1973 (App. Br., pp. 10-11).* However, such fact does not prevent Delta from complaining that it did not receive every single document it desired by November, 1973. Again, the inequality in discovery afforded the parties is evident: many papers were made available by Graphic to Delta, several of which were used by Delta in the depositions it took, while Graphic received documents at a late date and without opportunity to examine as to their import.

Essentially, all Delta does in its brief is complain about the discovery it allegedly did not obtain. Hardly a word is mentioned of the four depositions constituting hundreds of pages, of the inspection of equipment in New York and New Jersey, of the document discovery, and of the answers to many pages of interrogatories. Delta states it was entitled to discovery so that it could demonstrate that Graphic's counterclaim was without merit. Yet, Delta would apparently deny that same discovery to Graphic which would have enabled Graphic to ascertain vital facts supporting its counterclaim.

The result at the trial was obvious: Graphic was in no position to impeach Delta's employees through use of discovery devices and was in no position to question these

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* "App. Br." in parentheses refers to Appellant's principal Brief herein.

employees without seeming to appear random and haphazard and without having an idea of responses that could be elicited.

The cases hold that the relevant consideration is that the denial of discovery *might* have been responsible for the failure of a party to prove its case (App. Br., pp. 35-37). How can Graphic state what it would have discovered if accorded the right to take depositions? This cannot be Graphic's burden, for it has a virtually absolute right to take depositions and it did not violate the Federal Rules of Civil Procedure.

Even so, the testimony at the trial indicates the evidence which might have been elicited had Graphic been permitted preparation through proper discovery (App. Br., pp. 16-18). If, as Delta claims, relevant documents were turned over to Graphic in advance of trial why was it that Delta's witnesses revealed that vital records were at Delta's plant in Pennsylvania? Might it not be important that certain items for which Graphic was billed were returned by Graphic to Delta? Yet Delta's employee stated that such information was not available to him but was in Pennsylvania. Might it not be important to show when Delta's agreement with its service organization was in effect? Yet, Delta's director of manufacturing said such records were "back at the plant." Might it not be important to discover records as to certain service calls for equipment? Yet Delta's director of manufacturing did not even know whether the records were available anywhere. He did not know where the records were kept, but mentioned an apparent turnover in service managers (three in number). Might it not have been important for Graphic to ascertain the names and addresses of the former service managers

and examine them as witnesses? Why was there a succession of three service managers if Delta claims that its equipment was operable? Delta's own president did not even know whether Delta had reports of specific service representatives, and if so, where they would be. One may well conclude that Delta's representatives at the trial were being knowingly evasive, because they had to know there was no practical way to impeach or contradict them in view of the lack of prior discovery.

The complaint, reprinted in the Appendix, contains only the barest of allegations. How else, but by discovery, was Graphic to ascertain the facts behind the complaint? Delta raises the false and misleading statements that since the equipment was in the possession of Graphic, it had no need for discovery, since it could ascertain what was wrong with the equipment (D. Br., pp. 49-50). Such reasoning totally ignores the fact that the equipment was specially manufactured by Delta for Graphic and was to be serviced by Delta. It was Delta which had the service records. In other words, the expertise as to the particular equipment lay with Delta. The attempt to switch the burden of Delta's mistakes in manufacture to Graphic is ludicrous.

Delta pretends to criticize Graphic for citing cases that are not exactly and precisely identical to the factual situation herein, ignoring the fact that such cases can be cited for use in an analogous situation and for the principles of law enunciated therein. Delta offers not one reason why depositions of it could not have been taken from November 23-27, 1973 (App. Br., pp. 10-11). Delta offers no excuse why its counsel did not support Graphic in its application to the Court for discovery in view of the long standing stipulation between counsel as to the priority of discovery.

Instead, Delta seems to state that the trial should have occurred within 30 days after joinder of issue (D. Br., p. 7), although Delta admits that discovery only began late in May, 1973, was adjourned pending unsuccessful settlement discussions and the summer vacation period and was resumed at the end of August, 1973 (D. Br., p. 9).

POINT II

The lack of findings by the District Court is still clear and cannot be cured by resort to so-called "informal" procedures.

As appellant pointed out (App. Br., pp. 31-32), the docket sheets reveal an order with regard to Delta's motion for inspection and an order denying Graphic's motion for discovery. The sanction as to the counterclaim also appears in the record. There are only indications that pre-trial conferences were held, but there is no indication as to what occurred at such informal conferences. Contrary allegations by counsel are no substitute for docket entries and written orders in accordance with the Federal Rules of Civil Procedure and local Court rules.

Appellant reiterates that the District Court's order refusing the counterclaim contains no findings and it is thus impossible to know the basis of the District Court's ruling. Delta emphasizes that when the District Court imposed its sanction, it stated that it made an order as to certain aspects of discovery some two weeks earlier (D. Br., pp. 22-23). However, no such order appears in the record and Graphic denies it was ever made. Surely, informal recommendations of a Court at a pre-trial conference do not rise to the level of an order, and surely, a Court's subsequent

recollection is no substitute for the lack of an earlier order. Even if the District Court's recollections were characterized as findings, the facts are that its recitals are conclusory in nature, which, as then Judge Burger pointed out, do not afford an adequate basis for appellate review (App. Br., pp. 31-32). The United States Court of Appeals for the Seventh Circuit has stated that without the entry of relevant orders in the docket sheets, it could not assess the nature of a default nor know if one occurred (App. Br., p. 32).

The fact is that, in a gross violation of the Federal Rules of Appellate Procedure, Delta, throughout its brief, refers to matters not in the record on appeal—matters which Graphic denies in the strongest terms as having occurred as recited. Citing self-serving letters is no substitute for compliance with the Federal Rules of Civil Procedure, and testimonial assertions by Delta's counsel in its brief are manifestly improper and certainly deserve no consideration by this Court.

Delta's counsel, in what can only be construed as an attempt to prejudice Graphic before this Court, departs from the record to describe a pre-trial conference held on April 4, 1973 (the complaint was filed on March 15, 1973) (D. Br., pp. 7-8). Nothing in the record reveals what occurred at such conference. The purpose of such undocumented "testimony" by Delta's counsel is obviously to justify the glaring deviations from the Federal Rules of Civil Procedure which occurred herein by stating, in effect, that the District Court recommended "informal" procedures to be followed. However "informal" the procedures which were to be used, they certainly cannot supplant the requirements of the Federal Rules and an appropriate rec-

ord thereof. Counsel's recitation supports, perhaps inadvertently, appellant's assertions, in that (i) it is admitted that the Court wanted the scheduling of depositions, document discovery and answering of interrogatories to be "by agreement" and (ii) the District Court attempted to "rush" the parties by stating that all discovery should be completed within 30-40 days and that a trial should take place that June.

Delta's counsel continues his undocumented testimony with a recitation of a pre-trial conference on November 6, 1973 (D. Br., pp. 14-16). He recites an order of the District Court relating to times of discovery of which there is no record. Counsel even testifies as to the operation of Judge Pollack's mind (who allegedly delivered a "stern admonition" to Graphic's counsel) and to the irrelevant fact that counsel "returned to his office" that same afternoon. He also recites alleged defaults by Graphic but the support for same is a self-serving letter written by him.

Not content with his previous "testimony," Delta's counsel proceeds further by describing a letter he wrote to Graphic's counsel on November 16, 1973—a letter, as revealed in the footnote on page 18 of Delta's brief, admittedly not part of the record. The ensuing description of a pre-trial conference held on November 19, 1973 is also not in the record. In an obvious attempt to lend an air of credulity to his narrative, counsel refers to the alleged fact that Graphic's counsel "produced from his briefcase" a stipulation regarding the counterclaim.

POINT III

Delta fails to justify the District Court's violation of Rule 37, Federal Rules of Civil Procedure, and its abuse of discretion in refusing to allow Graphic to introduce any evidence supporting its counterclaim.

When the sanction as to the counterclaim was imposed on November 20, 1973, Graphic had not failed to appear for a deposition after being served with proper notice. That one minor employee could not be located and was finally produced later that afternoon certainly constitutes no ground for sanctions. Neither was there any serious or total failure to respond to interrogatories; two interrogatories had not been answered because it was thought that since Graphic had withdrawn that part of its counterclaim relating to them, Delta did not desire the answers (App. Br., pp. 20-23). Delta made no motion for an order compelling discovery with regard to the deposition and interrogatories, and the only relevant order entered was on November 20, 1973.

Delta's counsel's testimony in appellee's brief as to what occurred in a pre-trial conference on November 6 constitutes no part of the record. The fact remains that Rule 37 of the Federal Rules of Civil Procedure was violated in virtually all respects. The fact further remains that by the time of the order of November 20, 1973, Delta had received the overwhelming amount of its discovery. Indeed, the conference of November 20. 1973 was at Graphic's behest. The purpose of a sanction is to insure future compliance with the discovery rules and not to punish in an *ex post facto* fashion for past misbehavior (App. Br., p. 23).

Delta's counsel ignores the fact that he mentioned the existence of the counterclaim in front of the jury (282). Obviously, the jury could have thus concluded that the counterclaim had been stricken prior to trial for any number of reasons, such as on the merits or as a sanction. Delta's counsel took full advantage of the sanction in his emphasis to the jury that this was a "simple" case concerning only what Graphic Scanning owed Delta Data, and the District Court itself referred to the lack of counterclaims for the jury to decide.

Delta glibly calls the counterclaim "grandiose allegations of round number damage claims" (D. Br., p. 6). Why, then, is Delta unable to do anything but speculate as to why the equipment did not operate and why the replacement system ordered from another manufacturer did operate (D. Br., p. 30)? Even after portions thereof were withdrawn by stipulation, the counterclaim still included, *inter alia,* claims for damages as a result of purchasing equipment to be used in conjunction with the system sold to Graphic by Delta, the amount expended by Graphic in having to develop a new system to replace that of Delta and damage to Graphic's reputation (transcript of November 20, 1973 pre-trial conference, p. 12, reprinted in Appendix).

The proper procedure would have been for the District Court to have made specific findings with regard to each alleged default in discovery and to have afforded an opportunity to Graphic to correct such alleged defaults. Delta's sole concern is that it obtain full discovery while excluding any by Graphic. Neither can Delta gloss over the facts that it did accept alternative dates for depositions in November, 1973, although it maintains that such dates were fixed by Court order (App. Br., p. 33).

CONCLUSION

For the aforesaid reasons, as well as those stated in appellant's principal brief, the judgment below should be reversed and the case remanded for a new trial on the complaint and counterclaim, and appellant should be afforded an adequate opportunity to begin and complete its discovery in accordance with the Federal Rules of Civil Procedure.

Respectfully submitted,

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Service of ~~three~~ TWO (2) MK copies of the within REPLY BRIEF
is admitted this 29th day of May 1974

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